HOGAN & HARTSON L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

Writer's Direct Dial
(202) 637-5727

February 23, 1998

BY HAND DELIVERY

Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, CS Docket No. 97-248, RM No. 9097

Dear Ms. Salas:

GE American Communications, Inc., by its attorneys, hereby submits an original and 11 copies of its Reply Comments on the Notice of Proposed Rulemaking issued December 18, 1997 in the above-referenced proceeding. Copies of these Reply Comments also are being submitted, on paper and diskette, to Deborah Klein of the Cable Services Bureau, and on paper to International Transcription Services, Inc.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,

Peter A. Rohrbach
Jennifer A. Purvis

Enclosures

RECEIVED
FEB 23 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	CS Docket No. 97-248
Consumer Protection and Competition	)	
Act of 1992	)	RM No. 9097
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	
and Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS OF GE AMERICAN COMMUNICATIONS, INC.

Philip V. Otero
Senior Vice President and
General Counsel
GE American Communications, Inc.
Four Research Way
Princeton, NJ 08540

Peter A. Rohrbach
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

February 23, 1998

SUMMARY

GE Americom's interest in this proceeding is limited to the need to make the program access rules "transmission technology neutral." The current rules irrationally impose different access obligations depending upon whether a particular program service is transmitted over satellite or terrestrial networks.

Comments filed in this proceeding make clear that problems caused by this "satellite penalty" are growing and distorting market decisions. Programmers state that exclusivity provides them incentives to create new programming. However, they are forced to use terrestrial facilities to protect that exclusivity, even where satellites are more efficient. Rival MVPDs argue that the current irrational rule is permitting programmers to avoid access obligations for services that the Cable Act intended to be available.

GE Americom takes no position on when access obligations are in the public interest, and when they are not. However, the comments reinforce our point that transmission media should not be a relevant consideration. Some parties argue that the Commission lacks the statutory authority to correct this problem, pointing to language in the Cable Act referring to "satellite cable programming." However, these parties disregard that the express purpose of this part of the Act, set forth in Section 548(a), is to is to promote competition and diversity in the program market, not to favor one transmission mode over another. These parties also disregard legislative history of the Act demonstrating that Congress intended the Commission to reach the generic category of national and regional program services, without reference to transmission media. Finally, they ignore the Commission's authority,

both within and outside the Cable Act, to revise its regulatory policies to eliminate the satellite penalty.

In short, any connection between access obligations and transmission technology is irrational, and the Commission has the authority to correct this flaw in the current rules. It should do so as soon as possible.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	CS Docket No. 97-248
Consumer Protection and Competition	)	
Act of 1992	)	RM No. 9097
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	
and Diversity in Video Programming	)	
Distribution and Carriage	)	

REPLY COMMENTS OF GE AMERICAN COMMUNICATIONS, INC.

GE American Communications, Inc. ("GE Americom"), by its attorneys, hereby submits its Reply to comments filed in response to the Commission's *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding.

INTRODUCTION

GE Americom reiterates that its interest in this proceeding is limited to one narrow but highly important issue: the need to make the program access rules "transmission technology neutral." We have shown that the current rules distort the transmission market segment by irrationally imposing different obligations depending upon whether a given program service is distributed over

satellite or terrestrial networks.[1] This "satellite penalty" is completely unrelated to the purpose of Section 548 of the Communications Act.[2] Congress did not intend to distort competition in the network facilities market by unfairly favoring terrestrial technologies. Congress was legislating with respect to program services, not transmission media. The satellite penalty is a new anomaly arising from developments not contemplated when the 1992 Cable Act was adopted.

Other comments in this docket demonstrate that the satellite penalty is a growing problem. No party argues that a transmission-based distinction makes sense. Rather, the debate turns on two issues: when program access obligations actually should apply, and whether the Commission has the statutory authority to rationalize the rules. As discussed below, GE Americom takes no position on the scope of access obligations so long as they are made technology neutral. We also demonstrate that the Commission has the authority to eliminate the satellite penalty and bring common sense to the access rules. It should act now before the satellite penalty and its associated market distortions take root.

---

1 *See* 47 C.F.R. § 76.1000 *et seq.* This assumes that the distributor is affiliated with a cable operator.

2 47 U.S.C. § 548.

I. THE RECORD MAKES CLEAR THAT THE SATELLITE PENALTY PROBLEM IS SERIOUS AND GROWING RAPIDLY.

The comments underscore that the satellite penalty is a growing problem. As markets for national program services mature, and as new technologies increase channel capacity, it is inevitable that programmers will create new services focused on more narrowly defined geographic areas. The Commission can expect to see more and more of these regional services in the future. As such services develop, satellite and terrestrial facilities providers will compete to transmit them. GE Americom has made clear that it is not seeking an advantage for satellites. But we cannot stand by while terrestrial competitors tout that they can offer an "exemption" from FCC access obligations.

This problem is real today. Parties note that the current rules have recently prompted several cable programmers to use terrestrial rather than satellite facilities in their delivery of regional services.[3] Commenters also report that this

---

[3] Comments of the Consumers Union, Consumer Federation of America, and Media Access Project at 5 ("Consumers Union"); Comments of the Wireless Cable Association International, Inc. at 19-21 ("WCAI"); Comments of DirecTV, Inc. at 10-12 ("DirecTV"); Comments of Echostar Communications Corporation at 12 ("Echostar"); Comments of the National Rural Telecommunications Cooperative at 16-17 ("NRTC"); Comments of RCN Telecom Services, Inc. at 12-14 ("RCN"); Comments of Bell Atlantic at 10; Comments of BellSouth at 19-21. *See also* Comments of Comcast Corporation at 12-13 ("Comcast"); Comments of the National Cable Television at 14-15 ("NCTA"); Comments of Liberty Media Corporation at 24-29 ("Liberty"); Comments of Cablevision Systems Corporation at 4-7, 17-25 ("Cablevision").

avoidance of satellites will increase in the future.[4] Cablevision, for example, states that part of its reason for using terrestrial systems to deliver its new regional services in New York, Connecticut, and New Jersey is the flexibility this option gives it to enter into exclusive contracts for those services. Without this flexibility, according to Cablevision, programmers would not be willing to invest in the development of such programming.[5] Comcast and Liberty make similar points.[6] According to these commenters, freedom from access obligations is essential to the willingness of programmers to invest in the development of new services because the potential audience base and revenue stream for such services is limited.[7]

GE Americom has no reason to challenge these assertions; the programmers know their business best. We strongly agree that the program access rules should leave room for such innovation. But the irony is that the satellite penalty actually interferes with incentives to create new services because programmers are foreclosed from using satellites as a transmission mode even when more efficient. Put another way, it is the ability to offer exclusivity for program

---

[4] Comments of the Consumers' Union at 8-9; Comments of WCAI at 21-22; Comments of DirecTV at 12-13; Comments of BellSouth Corporation, *et al.* at 21 n.37 ("BellSouth").

[5] *See* Comments of Cablevision at 19-21.

[6] *See* Comments of Liberty at 28-29; Comments of Cablevision at 18-25; Comments of Comcast at 12-13.

[7] *Id.* at 22.

services that is important to their development, not the fact that a service is delivered terrestrially rather than by satellite. The current satellite penalty undercuts exclusivity that is in the public interest by forcing less efficient transmission of such services.

GE Americom takes no position as to when these regional services, or any other services, should be subject to access obligations. We recognize that the Cable Act contemplates that multichannel video program distributors ("MVPDs") have access rights to certain services. As discussed above, we also recognize that programmers have a greater incentive to create new and diverse program services if they are not restricted as to how they choose to market those services to competing MVPDs. GE Americom made clear in its comments that we leave it to the Commission to decide which program services should be subject to access obligations, and which should not. The Commission is in the best position to strike the right balance in this area, and thereby meet the overall public interest goals of fostering both competition among MVPDs and diversity of program services.

Either way, however, program access obligations should be based solely on considerations relevant to the programming itself, and not to the technical matter of how the programming is transmitted to cable head-ends or other MVPD distribution points. Where exclusivity is appropriate, it necessarily also serves the public interest to give programmers the freedom to use the most efficient mode of

transmission available. Where access obligations are appropriate, transmission choices should not be a vehicle to moot those obligations.[8]

In short, as programmers increasingly develop new regional program services, and as transmission technology develops, the satellite penalty threatens to become an increasingly serious problem. The Commission should end the satellite penalty now before it distorts markets further.

II. THE RECORD ALSO DEMONSTRATES THAT THE COMMISSION CAN AND SHOULD TAKE IMMEDIATE ACTION TO MAKE THE PROGRAM ACCESS RULES TRANSMISSION TECHNOLOGY NEUTRAL.

The record supports GE Americom's position that the satellite penalty should be eliminated. Some parties expressly endorse this point,[9] and no other party suggests that transmission media logically should control access obligations.

---

[8] Cablevision and NCTA note further that program vendors may have legitimate business reasons for using terrestrial delivery systems. Comments of Cablevision at 18; Comments of NCTA at 16. Again, GE Americom agrees. GE Americom recognizes that if terrestrial facilities are more efficient than satellites, then they deserve to win in the market. However, the record in this proceeding indicates that the satellite penalty in the program access rules is driving the use of terrestrial networks even when such facilities are not the most efficient transmission choice. By making the program access rules technology neutral, the Commission will ensure that satellite vs. terrestrial decisions are made for the reasons cited by Cablevision and NCTA, not because the rules place an irrational advantage on the use of one technology over another.

[9] *See* Comments of RCN at 4, 12; Comments of BellSouth at 22; Comments of SNET Personal Vision, Inc. at 5.

The only real debate is whether the Commission has the statutory authority to rationalize its rules. A close reading of the Cable Act demonstrates that the Commission can and should do so.

A. "Transmission Technology Neutral" Rules Avoid Burdensome Inquiries Into Factual Questions.

The *Notice* asks whether the program access rules should apply when "a vertically-integrated programmer moves from satellite-delivered programming to terrestrially-delivered programming for the purpose of evading the program access rules." *Notice* at 22, ¶ 51. The Commission also asks whether the rules should apply to programming moved from satellites "based on the effect, rather than the purpose, of the programmer's action." *Id.*

GE Americom believes that the Commission clearly has authority to consider matters of intent and effect when regulating program access matters. However, we also agree that this is a second-best approach that would involve burdensome analysis focused on an issue -- transmission mode -- that should be irrelevant. In that sense we agree with Cablevision, who notes that attempting to apply the rules on a case-by-case basis to programming that has been moved from satellite to terrestrial facilities with an intent to evade the program access rules would simply embroil both programmers and the Commission in protracted, fact-intensive disputes.[10]

---

[10] Comments of Cablevision at 6.

GE Americom submits that there is a much cleaner and more direct path to correcting the satellite penalty: the Commission should correct the underlying problem by making the program access rules technology neutral in the first place. The Commission should determine when access rights should or should not attach based on clear public interest considerations that are actually relevant to the programming in question -- as opposed to the irrelevant question of which transmission media the programmer has selected to distribute its service. In so doing, the Commission will avoid the burdensome, fact-based disputes Cablevision warns against. The Commission will avoid trying to determine a programmer's intent (or the effect of its actions) in selecting terrestrial as opposed to satellite service. Similarly, the Commission will avoid the factual quagmire of deciding whether a particular program service distributed terrestrially is "new," or rather an "old" service that had previously been delivered by satellite. These kind of inquiries bear no relevance to the ultimate question of whether program access rights are or are not in the public interest in a particular case.

B. The Commission Has Full Authority to Make the Access Rules Transmission Technology Neutral.

The only reason the Commission would be forced to fall back on "intent" or "effect" analysis would be if it could not adopt a clean technology neutral rule governing when access obligations should and should not apply. In its comments GE Americom demonstrated that the Commission has all the authority it

needs to eliminate the satellite penalty.[11] To summarize briefly, it is clear that the Congress did not intend to penalize satellite operators or advantage terrestrial facilities when it adopted the Cable Act. If anything, elimination of the satellite penalty is consistent with the Commission's general obligation, spelled out in Section 548(a), "to promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market."[12] Furthermore, the Commission has general authority under Section 4(i) to adjust its regulations when needed to accommodate on-going changes in communications technology.[13] This is clearly a situation where technology change has created a market distortion that the Commission is free to correct.

Other parties have questioned the authority of the Commission to rationalize the program access rules to eliminate the satellite penalty. Those commenters focus in particular on references in the Cable Act to "satellite cable programming" and "satellite broadcast programming," and argue that these references preclude the Commission from eliminating preferences for terrestrial

---

11 GE Americom Comments at 6-11.

12 47 U.S.C. § 548(a).

13 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968); *accord, National Broadcasting Co. v. United States*, 319 U.S. 192, 202-03 (1956); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282,284 (D.C. Cir. 1966).

network facilities. The commenters argue that Congress intended to exempt terrestrially delivered programming from the program access rules.[14]

The problem with this argumentation, however, is that it is not supported by the legislative record. First, it is clear that Congress did not intend in Section 548 to either penalize satellite operators or advantage terrestrial network providers. That issue never arose. In enacting Section 548, Congress was legislating with respect to program services, not transmission media.

Second, the legislative history of Section 548 makes clear that Congress intended the program access rules to apply generally to all nationally and regionally distributed program services because it was access to these services that Congress regarded as essential to a new MVPD's ability to compete.[15] The focus of

---

[14] *See* Comments of Cablevision at 6, 13-17; Comments of NCTA at 13-15; Comments of Liberty at 24-26. In addition, one commenter argues that Congress had the opportunity to address the satellite penalty problem in 1996, but chose not to do so. Comments of Comcast at 11. However, as late as January 1997, the Commission was reporting to Congress that while it recognized the potential for a satellite penalty problem, it had no actual evidence of that problem. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report*, 12 FCC Rcd 4358, 4434-35, ¶ 153 (1997) ("*1996 Cable Competition Report*"). With no evidence of a problem in 1996, therefore, it is hardly surprising that Congress did not address it.

[15] *See* S.12 (as passed Feb. 27, 1993), 102d Cong., 2d Sess. § 6 (pp. 25-30); S.12 (as reported with an amendment June 28, 1991), 102 Cong., 1st Sess. § 6 (adding Section 640 to the Communications Act) (pp. 78-80); S.12 (as introduced Jan. 14, 1991), 102d Cong., 1st Sess. § 6 (adding Section 640 to the Communications Act) (pp. 22-25). *See also* Joint Explanatory Statement of the Committee on Conference, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 91 (1992), *reprinted in* 1992 U.S.C.C.A.N 1273 ("Conference Report"); S. Rep. No. 92, 102d Cong., 2d Sess. 27-28 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1160-61("Senate Report") (all repeatedly using the terms "vertically integrated, national and regional cable programmers" in

[Footnote continued]

Congress in enacting Section 548, therefore, was the geographic and demographic reach of a program service, not the technology by which it was delivered. Congress simply used the terms "satellite cable programming" (and "satellite broadcast programming") because in 1992, it happened that virtually all national and regional program services were delivered by satellite.[16]

Indeed, the Senate Bill, which served as the foundation for the ultimate Act, expressly used the phrase "national and regional cable programming." [17] Congress replaced this terminology with the House Bill's terms "satellite cable programming" and "satellite broadcast programming" without any suggestion that it was creating an exemption for terrestrially transmitted programming. Rather, this change appears to reflect a specialized concern that

---

[Footnote continued]

discussing the program access provisions). *See also, e.g.,* 138 Cong. Rec. H8685 (statement of Sen. Rogers) (daily ed. Sep. 17, 1992); *id.* at S14248 (statement of Sen. Gorton) (daily ed. Sep. 21, 1992).

[16] Thus, the program access rules when originally adopted were "transmission technology neutral."

[17] *See* S.12 (as passed Feb. 27, 1993), 102d Cong., 2d Sess. § 6 (pp. 25-30); S.12 (as reported with an amendment June 28, 1991), 102 Cong., 1st Sess. § 6 (adding Section 640 to the Communications Act) (pp. 78-80); S.12 (as introduced Jan. 14, 1991), 102d Cong., 1st Sess. § 6 (adding Section 640 to the Communications Act) (pp. 22-25). *See also* Conference Report at 91 (1992), *reprinted in* 1992 U.S.C.C.A.N 1273; Senate Report at 27-28, *reprinted in* 1992 U.S.C.C.A.N. 1160-61 (all repeatedly using the terms "vertically integrated, national and regional cable programmers" in discussing the program access provisions). *See also, e.g.,* 138 Cong. Rec. H8685 (statement of Sen. Rogers) (daily ed. Sep. 17, 1992); *id.* at S14248 (statement of Sen. Gorton) (daily ed. Sep. 21, 1992).

nothing in the program access section of the Cable Act be read to reduce or limit the "access rights" of backyard dish users. Specifically, the legislative history suggests that Congress used the term "satellite cable programming" in Section 548 because in the technological world of 1992, that term was, at once, broad enough to reach the national and regional programming Congress wanted to capture, and specific enough to make clear that home satellite dish owners would continue to have access to the satellite signals that carried such cable programming. [18]

In short, the correct reading of the Cable Act is that Congress did not intend to create a satellite penalty, and that such a penalty is inconsistent with the general purposes of the program access rules spelled out in Section 548(a). When later subsections of the Act refer to "satellite cable programming," they are

---

[18] The House was concerned not only about access by MVPDs to DTH programming, but also that nothing in the language be interpreted as reducing the access rights the home dish industry enjoyed at the time. *See 1992 Cable Act Conference Report* at 91, *reprinted in* 1992 U.S.C.C.A.N 1273; *1992 Cable Act Senate Report* at 29, *reprinted in* 1992 U.S.C.C.A.N. 1162; S. Rep. No. 92, 102d Cong., 1st Sess. 15-16 (1991); H.R. Rep. No. 628, 102d Cong., 2d Sess. 45-46 (1992). *See also, e.g.*, (House debate preceding adoption of the Tauzin Amendment, and Senate debate prior to passage of S.12) 138 Cong. Rec. H6537 (daily ed. July 23, 1992) (statement of Rep. Rose); *id.* at H6538 (daily ed. July 23, 1992) (stmt of Rep. Markey); *id.* at H6539 (daily ed. July 23, 1992) (statement of Rep. Lehman) (arguing that the competing amendment Manton amendment would "insure[ ] that cable programming remains available to C-Band Satellite dishes at rates, terms and conditions comparable to cable"); *id.* at H6539 (daily ed. July 23, 1992) (statement of Rep. Richardson) (making a similar statement regarding access by the home satellite dish industry and "rural Americans who own backyard satellite dishes"); *id.* at H6541 (daily ed. July 23, 1992) (statements of Reps. Berman and Harris) (concerning the C-band home satellite dish industry and the direct broadcast satellite industry).

referring to the generic category of national and regional video services, not to a subset of those services transmitted only by satellite, or only by cable, or only by any other particular transmission mode. As technology has changed, the Commission is free to adopt rules that reflect Congress's fundamental intent. Indeed, to retain the irrational satellite penalty is to distort that intent, not the other way round.

Finally, and in any event, references to "satellite cable programming" in the Cable Act do not prevent the Commission from "rebalancing" the access rules to reflect current technology. On the one hand, even under the Cable Act the Commission is free to waive access obligations for satellite-delivered programming. It should do so where access obligations would not apply if the program services were transmitted terrestrially. On the other hand, the Commission is free pursuant to Section 4(i) of the Act to Communications Act to apply access obligations to terrestrially-delivered programming where such obligations would attach if satellite delivery was used. Using these powers, the Commission can harmonize the access rules to eliminate any irrational distinctions based on transmission media.

CONCLUSION

Again, GE Americom reemphasizes that it takes no position regarding when program services should bear access obligations, and when they should not. We fully recognize that access obligations can discourage investment in innovative programming, and we would support access rules that err on the side of protecting these interests. However, the Commission is in the best position to draw these lines.

Either way, however, programmers should be free to select the most efficient transmission mode for delivery of services to cable head-ends and other MVPD locations. The record here reconfirms that the satellite penalty is a growing problem that is distorting the network transmission arena. The record also

reconfirms that the Commission has the authority to eliminate this irrational result. The Commission should do so as soon as possible.[19]

Respectfully submitted,

GE AMERICAN COMMUNICATIONS, INC.

By: _____

Philip V. Otero
Senior Vice President and
General Counsel
GE American Communications, Inc.
Four Research Way
Princeton, NJ 08540

Peter A. Rohrbach
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

February 23, 1998

---

[19] The Commission should take care not to grandfather the program access status of services based on decisions to use either satellite or terrestrial facilities that programmers may have made prior to correction of the rules. GE Americom is concerned that terrestrial network companies may try to worsen the problem by encouraging inefficient migration from satellites now with the suggestion that access obligations will be excluded later no matter how this proceeding is resolved.

CERTIFICATE OF SERVICE

I, Patricia A. Green, hereby certify that copies of the foregoing "Reply Comments of GE American Communications, Inc." were served by hand delivery this 23rd day of February, 1998, to the following:

Deborah Klein
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
7th Floor
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20037

Patricia A. Green